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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

SETH ROGERS, Plaintiff and Appellant, v. ITY LABS CORP. et al., Defendants and Respondents.	H045347 (Santa Clara County Super. Ct. No. 17CV306546)

I. INTRODUCTION

Plaintiff Seth Rogers and defendant Jose Cong, both California residents, were business partners who incorporated defendant iTy Labs Corp. (iTy) in Delaware. After problems arose with the business, plaintiff alleges that he and Cong agreed to dissolve the corporation, but Cong instead secretly continued to operate the business while excluding plaintiff. Plaintiff filed a civil action against Cong and iTy, alleging nine causes of action.

Defendants filed a motion to dismiss or, in the alternative, to stay the action pursuant to Code of Civil Procedure sections 410.30 and 418.10,[1] on the ground that a mandatory forum selection clause in iTy's certificate of incorporation required all of plaintiff's claims to be heard in Delaware. In opposition, plaintiff contended that a

[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

mandatory forum selection clause in his stock purchase agreement with iTy required all his claims to be heard in California. The trial court determined that two of plaintiff's causes of action—the seventh cause of action for declaratory relief and the eighth cause of action to enforce inspection rights under the Corporations Code—were covered by the forum selection clause in the stock purchase agreement and must remain in California, while the remainder of the claims had to proceed in Delaware. The court stayed the litigation in California to allow litigation in Delaware to proceed first.

Plaintiff thereafter filed a motion to lift the stay as to the two causes of action that were to be litigated in California. The trial court treated the motion as a motion for reconsideration and denied the motion.

On appeal, plaintiff contends that the forum selection clause in the stock purchase agreement, which mandates California as the exclusive forum, encompasses all his claims, and therefore his entire action should proceed in California. Alternatively, plaintiff argues that, in view of the trial court's determination that at least two of his causes of action should proceed in California, it was unreasonable and unfair to enforce the forum selection clause in the certificate of incorporation, which mandates Delaware as the exclusive forum, with respect to the remaining causes of action. Finally, plaintiff contends that even if some of his claims must proceed in Delaware, the trial court abused its discretion in refusing to lift the stay as to the two causes of action that must be litigated in California.

We will reverse the trial court's order granting the stay and remand the matter. We conclude that, in addition to the two causes of action that the trial court determined were within the scope of the forum selection clause in the stock purchase agreement, which required certain claims to be litigated in California, an additional cause of action—the fourth cause of action for breach of fiduciary duty against defendant Cong—was also within the scope of that clause. In view of our determination regarding the proper scope of the forum selection clause in the stock purchase agreement, we will remand the matter

to the trial court to exercise its discretion and determine in the first instance (1) whether the forum selection clause in the certificate of incorporation, which requires litigation in Delaware, should be enforced as to the remaining causes of action, and (2) if so, whether the litigation in California should be stayed.

II. BACKGROUND

A. *The Complaint*

In February 2017, plaintiff filed a complaint against defendants iTy and Cong alleging the following.

Plaintiff and another person formed iTy in 2014. They planned to provide software to companies for better workforce management. Plaintiff developed the intellectual property that was used in iTy's software application "Plause."

Plaintiff later partnered with defendant Cong, and the two incorporated iTy in Delaware in May 2015. iTy does business in California and its business address is in San Jose. More than half of its employees, sales, and property are in California. Plaintiff was a board member and the corporate secretary of iTy, and Cong was a board member, the chief executive officer, and the chief financial officer. The parties understood that plaintiff was to provide the intellectual property while Cong would act as the "face" of the company, with his primary task to secure additional business and funding.

A few days after incorporating, plaintiff entered into a "Common Stock Purchase Agreement" (the stock purchase agreement) with iTy. Pursuant to the stock purchase agreement, iTy issued 2 million shares of common stock to plaintiff, and in return he paid $20 and transferred certain intellectual property rights to iTy. At the time the complaint was filed, plaintiff and defendant Cong each owned approximately 45 percent of iTy's shares.

iTy obtained funding from various investors thereafter. Plaintiff made an investment of $105,000, as reflected in two convertible promissory notes issued by the corporation. The notes, which were issued in 2016, matured in 2018. Under the notes,

the investment and unpaid interest could be converted to stock if certain conditions occurred. The notes further provided that the corporation could prepay the notes without penalty if a majority in interest of the holders of convertible promissory notes consented.

Shortly after iTy issued the second promissory note to plaintiff, the company "again" ran out of money.

In October 2016, with no money, no imminent business, and no one to acquire the company, plaintiff and defendant Cong "agreed to dissolve iTy, and wind up the company." Plaintiff believed iTy was thereafter being wound up with the assistance of outside counsel. He requested that counsel include him on any discussions regarding company business while he remained a director. Plaintiff did not receive any communication from Cong, iTy, or counsel for several weeks.

In November 2016, while attending a social gathering, plaintiff learned that defendant Cong with the assistance of counsel "continued to secretly operate iTy . . . while simultaneously excluding [plaintiff] from all company dealings, communications, and decisions." These operations included hiring a sales manager, soliciting bids for a new round of investors, entering term sheets with investors, restructuring salary, and adding features to Plause. Cong also revoked plaintiff's access to company e-mail and refused to restore access despite plaintiff's requests.

Plaintiff requested access to iTy's financial books and records, minutes of meetings of stockholders and/or directors, and documentation regarding the continued existence, dissolution, or sale of the company. Defendant Cong refused to provide the information and documents.

Based on these allegations, plaintiff alleges nine causes of action as follows.

The first through third causes of action are for fraud, concealment, and negligent misrepresentation against defendant Cong. These three causes of action are based on Cong's allegedly false promise and representation to dissolve and wind up iTy in early October 2016. In reliance on the representations, plaintiff "stepped away from his full-

time involvement with the company (but did not resign)." Plaintiff alleges that Cong's "true intentions" were to "oust" plaintiff from iTy and continue to operate the company on Cong's own. Plaintiff alleges that as a result of Cong's actions, plaintiff "was unable . . . to take steps to preserve the value of his shares and Promissory Notes, which value has since been diluted and diminished to [his] detriment." Plaintiff's damages also allegedly include "(a) the full amount of monies payable to and illegally withheld from [plaintiff] in the form of benefits, distributions and dividends, together with interest thereon; (b) damages resulting from the illegal taking of [plaintiff's] rights and interests, entitlements and benefits as a stockholder and board member of iTy; (c) damages resulting from the diminution in value of [plaintiff's] shareholding interests caused by the wrongdoing of Cong; and (d) damages sustained in order to mitigate against and reverse the illegal acts committed by Cong."

In the fourth cause of action for breach of fiduciary duty against defendant Cong, plaintiff alleges that Cong, as a director and stockholder, owes duties of trust, loyalty, and fidelity to plaintiff, a stockholder and board member. Cong allegedly breached his fiduciary duties by: (a) negotiating with plaintiff to wind up the company but then secretly continuing to operate the company, hire more employees, and seek investors and/or buyers to the exclusion of plaintiff; (b) entering into a term sheet with an investor without plaintiff's knowledge; (c) improperly attempting to vote plaintiff off the board of directors, resulting in his exclusion from corporate functions and decisions; (d) failing to deliver accurate and timely reports of iTy's business to plaintiff; (e) seizing control of the business, assets, and records of iTy in disregard for the rights of plaintiff as a stockholder and board member; (f) improperly attempting to procure stockholder votes to prepay the promissory notes held by plaintiff to prevent them from converting into preferred stock of iTy, and (g) refusing to allow plaintiff access to corporate books and records in violation of Corporations Code sections 1601 and 1602. Plaintiff's alleged damages, similar to the fraud-related causes of action, include (a) the money withheld from plaintiff in the form

of benefits, distributions, and dividends; (b) damages resulting from the illegal taking of his rights and interests, entitlements, and benefits as a stockholder and board member; and (c) damages resulting from the diminution in value of his shareholding interests caused by the wrongdoing of Cong.

In the fifth cause of action for breach of contract against defendant Cong, plaintiff alleges that Cong breached the oral agreement to dissolve and wind up iTy, including by hiring a sales manager, soliciting bids for a new round of investors, entering term sheets with investors, restructuring salary, and adding features to Plause. As a result of the breaches, plaintiff alleges that he has been excluded from the operation and management of iTy and has incurred damages.

In the sixth cause of action for unjust enrichment against defendant Cong, plaintiff alleges that Cong induced him to step back from the day-to-day business operations while secretly operating and attempting to grow the business. This allegedly improperly decreased plaintiff's percentage ownership and value of his ownership interest in the company, and increased Cong's percentage ownership interest and value of his ownership interest in the company.

In the seventh cause of action for declaratory relief against defendants Cong and iTy, plaintiff alleges that in January 2017, Cong and the minority stockholders improperly voted to remove him as a board member. Plaintiff alleges that the stock purchase agreement allows iTy to repurchase certain shares from him if he is terminated as an employee or consultant. Plaintiff alleges that he did not resign from iTy, nor was his status with the company terminated. Plaintiff alleges that Cong intends to wrongfully procure votes from investors and/or stockholders who obtained voting rights in iTy without plaintiff's knowledge or consent to pre-pay the promissory notes issued to plaintiff to prevent him from converting the promissory notes into preferred stock. Plaintiff seeks a declaration that: (1) he remains a board member; (2) he did not terminate his service status with iTy, his shares continue to vest in accordance with the

stock purchase agreement, and iTy's option to repurchase plaintiff's shares has not been triggered; and (3) iTy is not permitted to prepay the promissory notes.

In the eighth cause of action under Corporations Code sections 1601 and 1602, plaintiff seeks to enforce his rights as a shareholder and director to inspect corporate books and records.

In the ninth cause of action for injunctive relief against defendants Cong and iTy, plaintiff alleges that defendants' wrongful conduct will continue unless enjoined by the court, and that there is no adequate legal remedy for the threatened injuries.

B. *Defendants' Motion to Dismiss or Stay the Action*

Defendants iTy and Cong filed a motion pursuant to sections 410.30 and 418.10 to dismiss or, in the alternative, to stay the action to allow the dispute to be heard in Delaware. Defendants contended that the parties' dispute was governed by a mandatory forum selection clause in iTy's certificate of incorporation, which states: "Unless the Corporation consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for . . . any action or proceeding asserting a claim for breach of a fiduciary duty owed by any director, officer, employee or agent of the Corporation to the Corporation or the Corporation's stockholders, . . . or . . . any action or proceeding asserting a claim governed by the internal affairs doctrine." Defendants contended that plaintiff's entire action was within the scope of the forum selection clause because, among other reasons, plaintiff's complaint included a breach of fiduciary duty claim against Cong as a director of iTy. Defendants further argued that it was not unfair or unreasonable to require plaintiff to litigate in Delaware, where he and Cong chose to incorporate iTy.

In opposition, plaintiff contended that California was the proper forum for the entire action. He observed that the forum selection clause in the certificate of incorporation stated that Delaware was the exclusive forum "[*u*]*nless* the Corporation consents in writing to the selection of an alternative forum." (Italics added.) Plaintiff

argued that iTy consented to an alternative forum in his stock purchase agreement. Specifically, the stock purchase agreement states: "The validity, interpretation, construction and performance of this Agreement, and all acts and transactions pursuant hereto and the rights and obligations of the parties hereto shall be governed, construed and interpreted in accordance with the laws of the state of California, without giving effect to principles of conflicts of laws. For purposes of litigating *any dispute that may arise directly or indirectly from this Agreement*, the parties hereby submit and consent to the exclusive jurisdiction of the state of California and agree that any such litigation shall be conducted only in the courts of California or the federal courts of the United States located in California and no other courts." (Italics added.)

Plaintiff argued that his dispute with defendant Cong was governed by this forum selection clause in the stock purchase agreement because plaintiff "suffered harm as the result of [d]efendant Cong's actions in relation to [plaintiff's] shares and ownership interest in iTy." Plaintiff argued that his dispute with iTy was likewise governed by the forum selection clause in the stock purchase agreement because his "causes of action asserted against iTy [were] made by [him] as a shareholder." Plaintiff further contended that, even if some of his causes of action fell outside the stock purchase agreement, the entire action still had to be heard in California because (a) many of the causes of action did not fall within the scope of the forum selection clause in the certificate of incorporation, (b) his California statutory claims regarding shareholder and director inspections rights could not be waived, and (c) it would be unreasonable to enforce the forum selection clause in the certificate of incorporation. Plaintiff also provided a declaration in opposition to defendants' motion, stating that iTy's principal place of business, its office, its employees, and its assets were all located in California at the time of incorporation, and that iTy had no intention of operating its business in Delaware at the time it had incorporated.

In reply, defendants contended that the forum selection clause in the stock purchase agreement did not broadly apply to "any" dispute as argued by plaintiff, but rather was limited to "disputes which 'arise . . . from this [Stock Purchase] Agreement.' " Defendants argued that plaintiff's dispute did not arise from the stock purchase agreement because (1) Cong was not a party to the stock purchase agreement, which was between plaintiff and iTy, (2) plaintiff had contended that most of his claims arose out of defendant Cong's individual conduct as a business partner, rather than out of Cong's corporate conduct, and (3) most of plaintiff's claims were not being brought as a shareholder against iTy. Defendants argued that only part of the seventh cause of action for declaratory relief, which sought a declaration concerning, among other matters, the continued vesting of his stock, arose from the stock purchase agreement. As to that cause of action, defendants contended that it should be stayed pending resolution of all the other claims in Delaware.

A hearing was held on the motion in June 2017. Plaintiff contended that the forum selection clause in the stock purchase agreement, which applied to any disputes that "arise directly or indirectly from" the stock purchase agreement, included not only claims seeking to enforce the agreement, but also included the "relationships that arise out of" the agreement. Plaintiff argued that he had contributed "the core intellectual property" to the company in exchange for shares under the stock purchase agreement, that he had acquired rights as a shareholder through the stock purchase agreement, and that he had alleged in the complaint that he suffered harm or damages regarding the value of his shares. At the hearing, plaintiff acknowledged that he had not addressed in his written opposition the "arise . . . from" language in the forum selection clause in the stock purchase agreement, nor had he cited any caselaw regarding the meaning of that phrase.

Defendants contended that the "arise . . . from" language in the stock purchase agreement meant that the forum selection clause applied only to a narrow category of disputes relating to the interpretation or breach of the agreement, and that the clause did

not include all disputes that might arise from or relate to the relationship created by the agreement. Defendants further observed that in plaintiff's written opposition, he had argued that the first through third, fifth, sixth, and ninth causes of action all arose "out of individual conduct by [defendant] Cong outside of his capacity of a CEO." Defendants contended that plaintiff had thus taken a contrary position in his written opposition than what he was urging at the hearing, by arguing in his written opposition that it was individual conduct, by a person who was not a party to the stock purchase agreement, that had given rise to the causes of action, rather than the claims arising from the stock purchase agreement.

Plaintiff contended that defendant Cong was bound by the forum selection clause in the stock purchase agreement because he "signed it as president and CEO" of iTy.

C. *The Trial Court's July 7, 2017 Order Granting Defendants' Motion to Stay the Action*

By written order filed on July 7, 2017, the trial court determined that all of plaintiff's causes of action must proceed in Delaware, except the seventh cause of action for declaratory relief and the eighth cause of action to enforce inspection rights under the Corporations Code. The court granted defendants' motion to stay the case, so plaintiff could "refile and proceed with litigation in Delaware."

In making this order, the trial court determined that iTy's certificate of incorporation contained a forum selection clause that "require[d] any 'action' asserting a breach of fiduciary duty cause of action to proceed in Delaware." Because the complaint contained a breach of fiduciary duty cause of action (fourth cause of action), the certificate of incorporation required the entire case to proceed in Delaware. However, the court further observed that the forum selection clause in the certificate of incorporation stated that Delaware was the exclusive forum "[u]nless the Corporation consents in writing to the selection of an alternative forum." The court determined that the stock

purchase agreement "shows the parties consented in writing to the selection of an alternative forum for disputes arising out of the Stock Agreement."

Regarding which disputes arose out of the stock purchase agreement, the trial court concluded that the seventh cause of action for declaratory relief—which seeks a declaration that plaintiff remains a board member of iTy, that plaintiff's stock continues to vest, and that iTy should be prohibited from pre-paying the promissory notes—"contains allegations regarding [plaintiff's] stock rights that arise out of the Stock Agreement. Therefore, it is subject to the forum selection clause in the Stock Agreement."

The trial court also concluded that the eighth cause of action—in which plaintiff seeks to enforce shareholder inspection rights under the Corporations Code concerning books and records of the corporation—involved rights that "arose from the stock that [plaintiff] obtained through the Stock Agreement, and thus they are subject to the forum selection clause" in the stock purchase agreement.

Lastly, the trial court rejected plaintiff's argument that enforcement of the forum selection clause in the certificate of incorporation, which required the remainder of the action to proceed in Delaware, was unreasonable. The court reasoned that plaintiff was a co-founder of iTy, he chose to incorporate in Delaware together with defendant Cong, and the parties "elected to make Delaware the mandatory forum for legal disputes involving iTy."

D. *Plaintiff's Motion to Lift the Stay*

Plaintiff subsequently filed a motion to lift the stay as to the two causes of action that were to be litigated in California—the seventh cause of action for declaratory relief and the eighth cause of action to enforce inspection rights under the Corporations Code. Plaintiff contended that these two causes of action are "primarily directed against iTy, which is not a party to the other causes of action filed against Defendant Cong that [the] Court determined should be litigated in Delaware," and that litigation of these two causes

of action in California would "not prejudice the parties" and would "not interfere with any" litigation in Delaware.

In opposition, defendants iTy and Cong contended that there were no new circumstances warranting a lifting of the stay, where plaintiff had yet to file an action in Delaware, and that there was a risk of conflicting rulings between the two actions. Defendants also argued that, to the extent plaintiff's motion was a motion for reconsideration, he had failed to present "new or different facts, circumstances, or law" (§ 1008, subd. (a)) warranting reconsideration of the stay order.

In reply, plaintiff reiterated that the stay should be lifted as to the two causes of action that were to be litigated in California, and that there was no risk of contradictory rulings if the litigation proceeded on those two claims in California and the remaining claims proceeded in Delaware.

A hearing was held on the motion in August 2017. Plaintiff contended that the issues raised in the seventh cause of action for declaratory relief and the eighth cause of action to enforce inspection rights under the Corporations Code needed to be litigated in California first before the remaining claims were litigated in Delaware. In opposition, regarding the eighth cause of action to enforce inspection rights, defendants agreed with the trial court's observation that plaintiff could seek discovery of corporate records in the Delaware action. Defendants further argued that plaintiff's claim for declaratory relief overlapped with the claims to be litigated in Delaware, and therefore there was risk of inconsistent rulings if litigation proceeded in both forums.

At the hearing, the trial court stated that the fraud and related claims that were to be litigated in Delaware were "very serious" and were "much more important" than the two claims to be litigated in California. Given the overlapping issues between the claims to be litigated in Delaware and California, the court believed that the more serious claims should be resolved in Delaware first, with any remaining issues to be litigated in California thereafter.

By written order filed on August 28, 2017, the trial court denied plaintiff's motion to lift the stay. The court determined that plaintiff was seeking reconsideration of the prior order staying the action, but that plaintiff had failed to present new facts or law warranting reconsideration of the order (Code Civ. Proc., § 1008, subd. (a)).

Plaintiff filed a timely notice of appeal regarding the trial court's earlier July 7, 2017 order granting defendants' motion to stay the action.[2]

III. DISCUSSION

On appeal, plaintiff contends that the forum selection clause in the stock purchase agreement, which mandates California as the exclusive forum, encompasses all his claims, and therefore his entire action should proceed in California. Alternatively, plaintiff argues that, in view of the trial court's determination that at least two of his causes of action should proceed in California, it was unreasonable and unfair to enforce the forum selection clause in the certificate of incorporation, which mandates Delaware as the exclusive forum, with respect to the remaining causes of action. Finally, plaintiff contends that even if some of his claims must proceed in Delaware under the forum selection clause in the certificate of incorporation, the trial court abused its discretion in refusing to lift the stay as to the two causes of action that must be litigated in California.

[2] An order granting a motion to stay the action on the ground of inconvenient forum is appealable. (Code Civ. Proc., § 904.1, subd. (a)(3); *Berg v. MTC Electronics Technologies Co.* (1998) 61 Cal.App.4th 349, 355, fn. 1 (*Berg*).) A subsequent order denying a motion for reconsideration is not separately appealable. (§ 1008, subd. (g).) "However, if the underlying order that was the subject of reconsideration is appealable, the denial of reconsideration is reviewable as part of an appeal from the underlying order." (*Young v. Tri-City Healthcare Dist.* (2012) 210 Cal.App.4th 35, 51; see § 1008, subd. (g).)

A. *The Scope of the Forum Selection Clause in the Stock Purchase Agreement, Which Requires Litigation in California*

"[T]he procedure for enforcing a forum selection clause is a motion to stay or dismiss for forum non conveniens pursuant to Code of Civil Procedure sections 410.30[3] and 418.10.[4]" (*Berg, supra,* 61 Cal.App.4th at p. 358.) Regarding the interpretation of a forum selection clause, where, as here, "no conflicting extrinsic evidence has been presented, the interpretation of a forum selection clause is a legal question that we review de novo. [Citation.]" (*Animal Film, LLC v. D.E.J. Productions, Inc.* (2011) 193 Cal.App.4th 466, 471.)

The certificate of incorporation for iTy generally provides that "Delaware shall be the sole and exclusive forum" for "any action or proceeding asserting a claim for breach of a fiduciary duty owed by any director . . . of the Corporation to . . . the Corporation's stockholders." The trial court determined that plaintiff's entire case fell within the scope of this provision, because plaintiff alleges in the fourth cause of action that defendant Cong, as a director of iTy, breached his fiduciary duty to plaintiff as a stockholder of iTy. Because the certificate of incorporation also provides that iTy may "consent[] in writing to the selection of an alternative forum," and because iTy subsequently consented in the stock purchase agreement to California as the forum for specified disputes with plaintiff, the court concluded that the stock purchase agreement's forum selection clause would take "precedence" for disputes falling within the scope of that clause.

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[3] Section 410.30, subdivision (a) states in part: "When a court upon motion of a party . . . finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just."

[4] Section 418.10, subdivision (a) states in part: "A defendant, on or before the last day of his or her time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion for one or more of the following purposes: [¶] . . . [¶] (2) To stay or dismiss the action on the ground of inconvenient forum."

On appeal, plaintiff contends that *all* his causes of action fall within the scope of the forum selection clause in the stock purchase agreement, and that the trial court erred in determining that only two of his causes of action – the seventh cause of action for declaratory relief and the eighth cause of action to enforce inspection rights under the Corporations Code – fall within the scope.

The forum selection clause in the stock purchase agreement between plaintiff and iTy states: "For purposes of litigating any dispute that may *arise directly or indirectly from* this Agreement, the parties hereby submit and consent to the exclusive jurisdiction of the state of California and agree that any such litigation shall be conducted only in the courts of California or the federal courts of the United States located in California and no other courts." (Italics added.)

Whether one or more of plaintiff's causes of action is covered by the forum selection clause in the stock purchase agreement depends on whether the cause of action "arise[s] directly or indirectly from" that agreement. Generally, " ' "[t]he phrase 'arising out of' is equated with origination, growth or flow from the event." [Citations.]' (. . . *Palmer v. Agee* (1978) 87 Cal.App.3d 377, 386 ['arise' means to originate from specified source or to come into being].)" (*Central Pathology Service Medical Clinic, Inc. v. Superior Court* (1992) 3 Cal.4th 181, 187-188.) The California Supreme Court has "held that intentional tort causes of action can 'arise out of' contractual relationships. [Citations.]" (*Id.* at p. 188.) In this case, to determine the extent to which plaintiff's causes of action "arise directly or indirectly from" the stock purchase agreement, or otherwise "originat[e], grow[], or flow from" that agreement (*id.* at p. 187), we find instructive the following cases construing similar language.

In *Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491 (*Smith*), a forum selection clause applied to any matter " 'arising under or growing out of' " the corporate parties' contract, in which one corporation was appointed as the agent to represent the other corporation in soliciting group insurance policies in several states.

(*Id.* at p. 497, italics omitted; see *id.* at pp. 493-494.) The California Supreme Court rejected the contention that the forum selection clause only applied to contract claims and not to tort claims. The court determined that the tort counts for unfair competition and intentional interference with advantageous business relationships "arose directly out of [one party's] contractual relationship with [the other party] and may reasonably be interpreted as falling within" the forum selection clause. (*Id.* at p. 497.)

In *Olinick v. BMG Entertainment* (2006) 138 Cal.App.4th 1286 (*Olinick*), the plaintiff's employment agreement contained: (1) a choice of law provision, which stated that the agreement would be " 'governed by and construed and enforced in accordance with' " New York law, and (2) a forum selection clause, which specified that New York was the forum for all disputes " 'arising under' " the agreement. (*Id.* at p. 1291; see also *id.* at p. 1290.) Based on the forum selection clause, the defendant employer successfully moved to stay the action in California, pending the plaintiff filing suit in New York. (*Id.* at pp. 1289, 1293.)

On appeal, the plaintiff contended that the forum selection clause was limited to contractual disputes, and that his statutory claim for age discrimination and his tort claim for wrongful discharge in violation of public policy were not within the scope of the forum selection clause. (*Olinick*, *supra*, 138 Cal.App.4th at pp. 1296-1297.) The appellate court disagreed. The court determined that both the choice-of-law provision and the forum selection clause encompassed " 'all causes of action arising from or related to [the] [A]greement, regardless of how they are characterized, including tortious breaches of duties emanating from the agreement or the legal relationships it creates.' [Citation.]" (*Id.* at p. 1299; see *id.* at pp. 1300-1301, italics omitted.) The court explained that, although the statutory and tort claims were "not predicated on the existence" of the employment agreement, "the legal relationship between these parties emanates from [the employment agreement] and the interpretation of the [a]greement will be a central issue in the discrimination case." (*Id.* at pp. 1299, 1300.)

In addition to these cases addressing "arising" language in a forum selection clause, we also find helpful cases addressing such language in the context of a contractual arbitration clause. An arbitration clause "is generally considered to be more limited in scope" when it applies to a dispute " 'arising from' " the agreement. (*Cobler v. Stanley, Barber, Southard, Brown & Associates* (1990) 217 Cal.App.3d 518, 530 (*Cobler*).) In contrast, "[a] 'broad' clause includes those using language such as 'any claim arising from or *related to* this agreement' [citation]." (*Bono v. David* (2007) 147 Cal.App.4th 1055, 1067, some italics omitted.) "[A] clause agreeing to arbitrate ' "any controversy . . . arising out of *or relating to* this agreement," ' . . . might thus cover misconduct arising out of the agreement as well as contractual issues. [Citation.]" (*Cobler, supra,* at p. 530.) For example, " ' "[w]here contracts provide arbitration for ' "any controversy . . . arising out of *or relating to* the contract . . ." ' the courts have held such arbitration agreements sufficiently broad to include torts, as well as contractual, liabilities so long as the tort claims 'have their roots in the relationship between the parties which was created by the contract.' " ' [Citation.]" (*Rice v. Downs* (2016) 248 Cal.App.4th 175, 186, italics added (*Rice*).)

In this case, the forum selection clause in the stock purchase agreement encompasses any dispute that may "arise directly or indirectly from" that agreement. Although the phrase "arise . . . from" in the forum selection clause may be construed as having a narrow scope, we believe the inclusion of the word "indirectly" in the clause, so that the clause applies to disputes that "arise directly or *indirectly* from" the stock purchase agreement (italics added), can be construed to encompasses claims that " ' " 'have their roots in the relationship between the parties which was created by the contract.' " ' " (*Rice, supra,* 248 Cal.App.4th at p. 186.) Here, the relationship created by the stock purchase agreement was that plaintiff became a stockholder of iTy.

Based on this construction of the forum selection clause in the stock purchase agreement, we believe that the trial court correctly determined that six of plaintiff's

causes of action—the breach of contract claim (fifth cause of action), the three fraud-related claims (first through third causes of action), the unjust enrichment claim (sixth cause of action), and the claim for injunctive relief (ninth cause of action)—do not "arise directly or indirectly" from the stock purchase agreement, and that those causes of action do not otherwise "emanate[] from" plaintiff's stockholder relationship with iTy (*Olinick, supra,* 138 Cal.App.4th at p. 1300).

For example, plaintiff's breach of contract claim (fifth cause of action) is based on an alleged oral contract between plaintiff and *defendant Cong* to "*wind up*" iTy. (Italics added.) In contrast, the earlier stock purchase agreement, which contains the forum selection clause at issue, is between plaintiff and a different party—*defendant iTy*—and provides for plaintiff's *purchase of stock* in the corporation. Plaintiff's alleged oral contract with Cong thus appears to involve *new* and *different* contractual obligations to wind up the corporation—obligations that are completely *unrelated* to any contractual obligations in the stock purchase agreement that plaintiff entered into with iTy. (Cf. *Smith, supra,* 17 Cal.3d at p. 497 [tort causes of action "arose . . . out of" contract involving same parties].) Under the circumstances, plaintiff does not persuasively articulate how the oral contract claim against Cong "arise[s] directly or indirectly" from plaintiff's written stock purchase agreement with iTy. Plaintiff also does not establish that the oral contract claim against Cong involves " 'breaches of duties emanating from the' " stock purchase agreement with iTy or the stockholder relationship it created, or that the interpretation of the stock purchase agreement "will be a central issue" with respect to the claim for breach of oral contract against Cong. (*Olinick, supra,* 138 Cal.App.4th at pp. 1299, 1300, italics omitted; see *id.* at pp. 1300-1301.)

Likewise, plaintiff's fraud-related claims (first, second, and third causes of action) and unjust enrichment claim (sixth cause of action) against defendant Cong all appear to arise out of factual allegations similar to the allegations underlying the breach of oral contract claim against Cong, that is, the two agreed to wind up the business but Cong

instead continued to operate the business on his own. The claim for injunctive relief (ninth cause of action) also appears to be based on these same allegations.[5] Consequently, for the reasons we have articulated regarding the breach of contract claim, plaintiff fails to establish that these other causes of action "arise directly or indirectly" from the stock purchase agreement.

We are further persuaded that these six causes of action (the breach of contract claim, the three fraud-related claims, the unjust enrichment claim, and the claim for injunctive relief) do not fall within the scope of the forum selection clause in the stock purchase agreement, in view of plaintiff's briefing in the trial court. In the trial court, plaintiff asserted that these causes of action are based on Cong's "individual conduct . . . outside of his capacity [as] a CEO," that these causes of action involve "individual conduct by Defendant Cong and are individual wrongs committed against [plaintiff]," and that these causes of action are "asserted by one business partner ([plaintiff]) against the other (Defendant Cong) . . . for the desired purpose of driving [plaintiff] out of their joint business venture." Given plaintiff's assertion that these causes of action are against Cong in Cong's individual capacity, and not in Cong's capacity as an officer, director, or stockholder of the company, plaintiff fails to articulate how these causes of action can "arise directly or indirectly" from the stock purchase agreement. The stock purchase agreement was "by and between" iTy and plaintiff only. Cong was not a party to the stock purchase agreement, and he only signed the agreement on behalf of the contracting party *iTy* and only in his capacity as president and chief executive officer of iTy. In contrast, plaintiff's breach of contract claim, the three fraud-related claims, the unjust enrichment claim, and the claim for injunctive relief (first, second, third, fifth, sixth, and

[5] Although the ninth cause of action for injunctive relief is alleged against both defendants Cong and iTy, plaintiff clarified in the trial court that "Defendant Cong is the only party engaging in affirmative actions to be enjoined" and that "Defendant iTy is only a nominal defendant in this cause of action."

ninth causes of action) are purportedly asserted against Cong only in his *individual* capacity and not his corporate capacity.

We are not persuaded by plaintiff's reliance on the phrase "any dispute" in the stock purchase agreement's forum selection clause, which applies to "any dispute that may arise directly or indirectly from" the agreement. Plaintiff contends that the phrase "any dispute" supports his interpretation that *all* his causes of action are encompassed in the forum selection clause. Although the phrase "any dispute" may encompass a broad range of claims, that phrase is necessarily modified by the language that follows it, which is: "any dispute *that may arise directly or indirectly from*" the stock purchase agreement (italics added). (See *Rice, supra*, 248 Cal.App.4th at p. 187.)

We are also not persuaded that plaintiff's claims for damages, which include alleged damages to his stockholding interests in iTy, demonstrate that these six causes of action against *Cong* "arise directly or indirectly" from the stock purchase agreement that plaintiff entered into with *iTy*. That Cong allegedly undertook tortious and other wrongful conduct against plaintiff that affected plaintiff's stockholder relationship or interest under a contract with a *different* party (iTy) does not establish that Cong's conduct arose "directly or indirectly" from that contract (the stock purchase agreement), or that the causes of action against Cong for wrongdoing otherwise "emanate[] from" plaintiff's stockholder relationship with *iTy* (*Olinick, supra*, 138 Cal.App.4th at p. 1300).

We further observe that, to the extent plaintiff alleged a cause of action addressing *specific* rights provided by the stock purchase agreement that Cong directly or indirectly interfered with, the trial court found that the cause of action *is* covered by the forum selection clause in the stock purchase agreement. For example, in the seventh cause of action for declaratory relief, plaintiff alleged that Cong improperly attempted to remove plaintiff as a board member, which affects the vesting of plaintiff's stock under the stock purchase agreement. The trial court correctly determined that this cause of action "contains allegations regarding [plaintiff's] stock rights that arise out of the Stock

Agreement" and "[t]herefore, it is subject to the forum selection clause in the Stock Agreement."

However, we reach a different conclusion than the trial court regarding plaintiff's fourth cause of action for breach of fiduciary duty against Cong. The trial court determined that the fourth cause of action was not within the scope of the forum selection clause in the stock purchase agreement. In the fourth cause of action, plaintiff alleges that Cong, "[a]s a director and stockholder of iTy," owes fiduciary duties to plaintiff, a "co-board member, officer, and stockholder of iTy." Plaintiff alleges that Cong breached those fiduciary duties to plaintiff by committing various acts.

We determine that, because the fiduciary duties that Cong allegedly owes to plaintiff arise, at least in part, from plaintiff's stockholder relationship with the corporation, and because that stockholder relationship arises from the stock purchase agreement, plaintiff's fourth cause of action for breach of fiduciary duty against Cong "arise[s] directly or indirectly from" the stock purchase agreement and is thus within the scope of the forum selection clause of that agreement.

Our determination regarding the fourth cause of action for breach of fiduciary duty is consistent with the trial court's reasoning that plaintiff's eighth cause of action, in which he seeks to enforce his shareholder inspection rights of corporate books and records, is within the scope of the forum selection clause of the stock purchase agreement. Regarding the eighth cause of action to enforce shareholder inspection rights, the trial court reasoned that those inspection "rights arose from the stock that [plaintiff] obtained through the Stock Agreement, and thus they are subject to the forum selection clause therein." Indeed, defendants, in this court, acknowledge that "forum selection clauses can encompass claims originating from a particular 'contractual relationship.' " Defendants also acknowledge that the eighth cause of action arises from the stock purchase agreement, because the shareholder inspection rights alleged in the eighth cause of action "originated from the contractual relationship formed by the Stock Purchase

Agreement." Likewise, we determine that in the fourth cause of action, the fiduciary duties owed to plaintiff by defendant Cong "arose from the stock that [plaintiff] obtained through the Stock Agreement," and "originated from the contractual relationship formed by the Stock Purchase Agreement," and thus the fourth cause of action for breach of fiduciary duty is subject to the forum selection clause in the stock purchase agreement.

We further determine that, although Cong was not a party to the stock purchase agreement, the forum selection clause in that agreement may be applied to him with respect to the fourth cause of action for breach of fiduciary duty.

It has been stated that " ' "[a] range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses." [Citations.]' [Citation.]" (*Lu v. Dryclean-U.S.A. of California, Inc.* (1992) 11 Cal.App.4th 1490, 1494.) The forum selection clause in the stock purchase agreement may apply to Cong if he "was 'closely related to the contractual relationship' " between plaintiff and iTy. (*Bancomer v. Superior Court* (1996) 44 Cal.App.4th 1450, 1459 (*Bancomer*).) To demonstrate that Cong was " 'closely related to the contractual relationship,' " it must be shown "by specific conduct or express agreement" that "(1) [Cong] agreed to be bound by the terms of the [stock] purchase agreement, (2) the contracting parties intended [Cong] to benefit from the [stock] purchase agreement, or (3) there was sufficient evidence of a defined and intertwining business relationship with a contracting party." (*Id.* at p. 1461.)

In this case, there is no evidence that (1) Cong individually agreed to be bound by the terms of the stock purchase agreement between plaintiff and iTy, or that (2) plaintiff and iTy intended Cong to benefit from that agreement. There was evidence, however, that (3) Cong had "a defined and intertwining business relationship with a contracting party." (*Bancomer*, *supra*, 44 Cal.App.4th at p. 1461). Indeed, the trial court impliedly made this finding, as it determined that the forum selection clause in the stock purchase agreement applied to Cong with respect to the seventh cause of action (declaratory relief)

and the eighth cause of action (shareholder and director inspection rights). Regarding Cong's "defined and intertwining business relationship with a contracting party" (*ibid.*) or his "close[ness] to the contractual relationship" (*Bugna v. Fike* (2000) 80 Cal.App.4th 229, 235), Cong was an officer, director, and shareholder of iTy, which was a party to the stock purchase agreement, and he allegedly breached fiduciary duties to plaintiff that arose from the stock purchase agreement. Cong's breaches of fiduciary duty allegedly included conduct that he *and* iTy participated in, such as allegedly refusing to allow plaintiff access to corporate books and records pursuant to the Corporations Code. Under the circumstances, the forum selection clause in the stock purchase agreement may properly apply to Cong with respect to plaintiff's breach of fiduciary duty claim (fourth cause of action). (See *Marano Enterprises of Kansas v. Z-Teca Restaurants, L.P.* (8th Cir. 2001) 254 F.3d 753, 757 [an officer, director, and shareholder of signatory was " 'closely related' to the disputes arising out of the agreements" and thus he was "bound by the forum-selection provisions" in those agreements].)[6]

[6] Plaintiff contends in his reply brief on appeal that if defendant Cong's argument has merit (that is, the forum selection clause in the stock purchase agreement does not apply to Cong because he did not sign the agreement), then the forum selection provision in iTy's certificate of incorporation does not apply to plaintiff's claims against Cong, because neither individual signed the certificate of incorporation. Plaintiff never previously contended that the forum selection provision in the certificate of incorporation did not apply to his claims against Cong due to the absence of their signatures on the certificate. Appellate courts ordinarily will not consider a new issue that is raised for the first time in the reply brief. (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3; *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764-765.)

B. *Whether Enforcement of the Forum Selection Clause in the Certificate of Incorporation, Which Requires Litigation in Delaware, Would Be Unreasonable, and Whether the Stay on the California Litigation Should Be Lifted*

Generally, a mandatory forum selection clause[7] "may be given effect, in the [trial] court's *discretion* and in the absence of a showing that enforcement of such a clause would be *unreasonable*." (*Smith, supra,* 17 Cal.3d p. 496, italics added; accord, *Berg, supra,* 61 Cal.App.4th at p. 358 ["not even a 'mandatory' forum selection clause can completely eliminate a court's discretion to make appropriate rulings regarding choice of forum"].)

Plaintiff contends that, in view of the trial court's determination that at least two of his causes of action should proceed in California, it was unreasonable and unfair to enforce the forum selection clause in the certificate of incorporation, which mandates Delaware as the exclusive forum, as to the remaining causes of action. Plaintiff argues that the "court's decision to split the action between California and Delaware . . . constitutes an abuse of discretion." Plaintiff further argues that even if some of his claims must proceed in Delaware and some must proceed in California, the trial court abused its discretion in refusing to lift the stay as to the two causes of action that must be litigated in California.

As we have just explained, in addition to the two causes of action that the trial court determined must be litigated in California (the seventh cause of action for declaratory relief and the eighth cause of action to enforce inspection rights under the Corporations Code), we have determined that the fourth cause of action for breach of fiduciary duty against defendant Cong must also proceed in California pursuant to the

[7] A forum selection clause may be mandatory or permissive. In this case, none of the parties disputes that the forum selection clauses in the certificate of incorporation and the stock purchase agreement are mandatory clauses.

forum selection clause in the stock purchase agreement. In view of our determination that an additional cause of action must proceed in California, we will remand the matter to the trial court to exercise its discretion and consider in the first instance, in view of the three causes of action that must be litigated in California, (1) whether the forum selection clause in the certificate of incorporation, which mandates Delaware as the exclusive forum, should be enforced as to the remaining six causes of action, and (2) if so, whether the litigation in California should be stayed. We express no opinion on these issues.

IV. DISPOSITION

The trial court's July 7, 2017 order staying the action is reversed. The matter is remanded to the trial court to determine, upon further briefing and argument as determined by the trial court, (1) whether the forum selection clause in iTy Lab Corp.'s certificate of incorporation (which identifies Delaware as the exclusive forum) should be enforced as to the first, second, third, fifth, sixth, and ninth causes of action, in view of the applicability of the forum selection clause in the Common Stock Purchase Agreement (which identifies California as the exclusive forum) to the fourth, seventh, and eighth causes of action, and (2) if the forum selection clause in iTy Lab Corp.'s certificate of incorporation should be enforced as to first, second, third, fifth, sixth, and/or ninth causes of action, whether the litigation in California on the remaining claims should be stayed.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MIHARA, J.

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DANNER, J.

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